Children and Family Law Program
Committee for Public Counsel Services

Recent Developments
(July 2001 – October 2001)

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The Appeals Court held that the trial judge erred when she failed to decide between two competing adoption plans and instead left it to DSS's discretion to determine whether the child should be adopted by her current foster parents or by an uncle in California. Id. at 476. The trial judge found the parents unfit to care for the child, but held that the evidence was insufficient to determine which of the two proposed plans was in the child's best interests. The judge, nevertheless, entered judgment dispensing with the parents' consent to the adoption of their child and left the choice of adoptive placement to DSS's discretion subject to review by the adoption court under G.L. c.210, §6.

In a G.L. c.210, §3 proceeding, the judge must consider the adoption plan proposed by DSS and any plan proposed by the parents and then determine which placement is in the child's best interests. Id. at 475. "Consider" means more than review; the judge must meaningfully evaluate the suitability of the proposed plan or plans and accept one or none. Id. at 477-478. Review by the judge approving the adoption under Section 6 is an inadequate substitute because the parents, whose rights have been terminated, are not present at the proceeding, and because the review is limited to determining whether the petitioners are suitable to care for the child, not to considering the merits of more than one adoption alternative. Id. at 476. If a judge lacks sufficient evidence to make an appropriate determination, he or she should enter a finding of unfitness, suspend the proceedings, and take evidence at a later date before entering a decree dispensing with consent to adoption. Id.

ADOPTION - DISPENSING WITH PARENTAL CONSENT, EFFECT OF DECREE

Adoption of Donald, 52 Mass. App. Ct. 901 (2001) (rescript).

After judgment has been entered dispensing with a parent's consent to the adoption of her child, the parent has no right to notice of, or to participate in, a permanency hearing under G.L. c.119, §29B. Id. at 901-902. This is true even if the judgment terminating the parent's rights is pending appeal. Id. at 902 (citing Adoption of Helen, 429 Mass. 856, 864 (1999)).

ADOPTION – DISPENSING WITH PARENTAL CONSENT, FINDINGS OF FACT

Adoption of Hank, 52 Mass. App. Ct. 689 (2001) -- Rapoza, Kantrowitz, McHugh. See Parental Unfitness – Sufficiency of the Evidence.

The father appealed from a judgment of the Probate Court finding him unfit and dispensing with consent to the adoption of his children. Among other things, he challenged the trial judge's findings of fact, which adopted by reference, DSS's proposed findings. The Appeals Court held that this practice was improper as it runs afoul of Mass. R. Civ. P. 52(a), governing findings of fact in cases tried before a judge. Id. at 692-693. Although the Massachusetts Rules of Civil Procedure do not apply to these proceedings, the rules may be relied upon by analogy as a cogent standard. Id. at 692 n.8 (citing Adoption of Reid, 39 Mass. App. Ct. 338, 341 (1995)).

Where a judge has adopted verbatim a party's proposed findings, the standard of appellate review is unchanged, although the findings must be subject to stricter scrutiny by the appellate court. Id. at 693

(citing Cormier v. Carty, 381 Mass. 234, 237 (1980)). However, in this case the findings were amply supported by the evidence. Id. at 693. In addition, the fact that the judge rejected DSS's proposed adoption plan further indicates that he gave close attention to the evidence. Id.

APPEALS – SUPERINTENDENCE OF INFERIOR COURTS UNDER CH. 211, §3

Rasheed v. Appeals Court, 434 Mass. 1012 (2001) (rescript)

The SJC affirmed the judgment of a single justice denying the petitioner relief under G.L. c.211, §3 where the petitioner: (1) failed to demonstrate that he could not obtain full relief through other remedies; and (2) failed to support his allegations on the record with specific facts or legal authority. Id. at 1013. The Appeals Court had dismissed the petitioner's appeal from a postconviction motion for lack of prosecution and the petitioner sought relief from a single justice of the SJC. Under c.211, §3, a petitioner must show a substantial claim of violation of a substantial right and that the violation could not be remedied through other available means. Id. Here, the petitioner could have sought further appellate review from the Appeals Court under Mass. R. App. P. 27.1(a). Alternatively, he could have filed a motion in the trial court claiming his appellate counsel was ineffective in failing to comply with the rules of appellate procedure. Id. Further, petitioner failed to create a record to substantiate his allegations. Id.

APPELLATE PRACTICE - STAY OF DECREE DISPENSING WITH PARENTAL CONSENT

Adoption of Don, 435 Mass. 158 (2001) -- Marshall, Greaney, Spina, Cowin, Sosman, Cordy. See Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation;" Due Process - Delay Of Proceedings; Parental Unfitness – Sufficiency of Evidence.

The SJC affirmed the orders of a single justice of the Appeals Court denying parents' motion to stay the judgment dispensing with parental consent. Id. at 170. The parents "had not presented meritorious issues in the usual sense of that phrase in appellate practice." Id. (citing Adoption of Duval, 46 Mass. App. Ct. 916, 917 (1999)).

APPELLATE PRACTICE – TIMELINESS OF NOTICE OF APPEAL

BJ's Wholesale Club, Inc. v. City Council of Fitchburg, 52 Mass. 585 (2001) – Greenberg, Gillerman, Doerfer.

A housing court judge did not abuse his discretion in denying a third party's motion to enlarge the time to file a notice of appeal from the denial of her motion to intervene in the case. Her motion to intervene was denied on July 14 and entered on the docket. However, she did not receive notice of the order until September 6. On September 12, she filed a motion to extend time for filing an appeal under Mass. R. App. P. 4(c). Although the trial court may extend the time to file an appeal another 30 days for excusable neglect, "excusable neglect requires circumstances that are unique or extraordinary, and is meant to take care of emergency situations only." Id. at 587-588 (citations omitted). The party seeking to intervene in this case could have and should have checked the docket periodically and should not have relied on the clerk's duty to send her notice of the order. Id. at 588.

CONFRONTATION OF WITNESSES – CHILD'S TESTIMONY, ALTERNATIVES TO "FACE TO FACE CONFRONTATION"

Adoption of Don, 435 Mass. 158 (2001) -- Marshall, Greaney, Spina, Cowin, Sosman, Cordy. See Appellate Practice - Stay Of Decree Dispensing With Parental Consent; Due Process - Delay Of Proceedings; Parental Unfitness – Sufficiency of Evidence.

The right to confront witnesses provided by Article 12 of the Massachusetts Declaration of Rights does not apply to proceedings to terminate parental rights. Id. at 168-169. The parents argued that special seating arrangements for taking the trial testimony of two of the children violated their rights under Article 12 and their due process rights. While acknowledging that parents have a fundamental and constitutionally protected right to the custody of their children, the SJC stated that it has repeatedly declined to adopt in custody proceedings the full panoply of constitutional rights afforded criminal defendants. Id. at 168-169. "We are not persuaded that the unique characteristics of a termination of parental rights proceeding require incorporating the art. 12 right of face-to-face confrontation guaranteed to defendants in criminal cases, and decline the invitation to do so here." Id. at 169.

The SJC further held that the seating arrangements did not violate the parents' due process rights. Id. at 169 n.16. The children sat at one end of counsel's table, the same place as the other witnesses. The parents were required to sit in the last and third row of the small courtroom and not to move during the children's testimony. They could sit anywhere in that row they chose. Id. at 167-168 & n.16. In a termination proceeding, due process requires that parents have a right to effectively rebut the allegations against them. Id. at 169 n.16. Due process was satisfied here because the parents, through counsel, had an opportunity to vigorously cross-examine the children and to present witnesses and other evidence on their own behalf. Id.

COUNSEL - CONFLICT OF INTEREST, OFFICE SHARING

Commonwealth v. Allison, 434 Mass. 670 (2001) – Marshall, Greaney, Ireland, Spina, Cowin.

Following his murder conviction, the defendant filed a motion for a new trial arguing that his trial counsel had a conflict of interest because the attorney shared offered space with counsel for the co-defendants. The SJC held that the defendant failed to establish an actual conflict of interest or that he was materially prejudiced by a potential conflict. Id. at 688-697. In its decision, the SJC provided detailed guidance to attorneys sharing office space to avoid being treated as a firm or partnership for purposes of the rules of conflict of interest and imputed disqualification to represent adverse parties. Id. at 688-692.

When a defendant raises the issue that his attorney has a conflict of interest, the first question is whether there is an actual or a potential conflict of interest. Id. at 688. If an actual conflict exists, the defendant need not show that he was prejudiced or that the conflict had an adverse effect on his attorney's performance. Id. However, if there is only a potential conflict, then the defendant must demonstrate that he was prejudiced by the conflict. Id. The sharing of office space among attorneys is not per se an actual conflict of interest. Id. Instead, whether attorneys should be treated as members of the same firm or partnership for purposes of barring them from representing parties with adverse interests depends upon whether they (1) hold themselves out to the public as a firm, or (2) conduct themselves as a firm. Id. at 690. It is a fact-bound inquiry, requiring the court to consider a number of factors. Id. at 690.

To avoid holding themselves out to the public as a firm, attorneys sharing office space: (1) should not share letterhead, business cards, and telephone directory listings; (2) should not describe their affiliation

in a way that would mislead or confuse the public; (3) should have their own telephone number; and (4) if sharing a receptionist, should insure that the phone is answered as if it were an individual law office. Id. at 690-691. In addition, attorneys who wish to avoid being treated as a firm: (1) should have separate offices; (2) should not have access to each other's offices; (3) should not have access to each other's client files; (4) should not share support staff who have access to privileged or sensitive materials; (5) must maintain separate facsimile machines or warn potential users that the communications are not private; (6) must establish office procedures for use of shared facsimile and copier machines to ensure that confidential materials are not seen by those not employed by the attorney. Id. at 691-692. Finally, attorneys must avoid divulging client confidences with the other attorneys and may not provide emergency coverage for each other beyond delivering nonconfidential messages or explaining absences. Id. at 692-693.

The defendant must prove both the existence and precise character of the conflict without speculation or conjecture. Id. at 694, 696. In this case, the defendant failed to show an actual conflict of interest existed as a result of the shared office space. Id. at 688. He also failed to show that he was materially prejudiced by any potential conflict of interest. Id. at 696.

In a footnote, the SJC mentions an incident in which the investigator for one of the co-defendant's counsel interviewed the defendant in jail. The Court found "most troublesome" the possibility that defendant's counsel permitted the investigator to speak with his client without counsel being present at the interview. Id. at 694 & n.18.

COUNSEL – INEFFECTIVE ASSISTANCE

Commonwealth v. Johnson, 435 Mass. 113 (2001) – Marshall, Spina, Cowin, Sosman, Cordy. See Evidence – Hearsay, Prior Recorded Testimony.

On appeal from a conviction for first degree murder, the SJC rejected defendant's claims that his counsel was ineffective: (a) for failing to cross-examine a witness about the effect of illness and medication on his ability to identify the defendant; (b) in the manner in which counsel presented a dual defense of misidentification and mental impairment; and (c) in conducting a voir dire of a potential witness who later invoked her privilege against self-incrimination and did not testify. Id. at 122-132. Regarding the first claim, the SJC held that while the witness could have been productively impeached with his illness and the side effects of the medications, failure to do so did not amount to ineffective assistance where a number of other witnesses had identified the defendant. Id. at 126-127. On his second claim, the SJC noted that misidentification was the defendant's preferred theory and a defense of mental impairment was preferred by trial counsel, that counsel discussed with, and the defendant agreed to, the strategy of pursuing both defenses, and that counsel's implementation of the strategy was consistent with that agreement. Id. at 128-132. Finally, the Court held that trial counsel's decision to voir dire the witness was not manifestly unreasonable where his purpose was to exclude from evidence admissions the defendant made to the witness, by showing that the statements were not voluntary due to the defendant's intoxication. Id. at 132-134.

Commonwealth v. Duran, 435 Mass. 97 (2001) – Marshall, Spina, Cowin, Sosman, Cordy.

The SJC rejected defendant's claims of ineffective assistance of counsel based on failure to investigate the incident and failure to thoroughly impeach several prosecution witnesses. Id. at 101-106. The central issue in this murder case was identification of the perpetrator. The defendant argued that his counsel was ineffective for failing to identify other witnesses to the incident. The SJC rejected this claim noting that given the facts, efforts to locate other witnesses likely would not have been successful,

that defense counsel might reasonably have been wary of unearthing unfavorable testimony, and that the defendant did not specify any particular information helpful to his case that might have been discovered by investigation. Id. at 103. The Court also rejected the defendant's argument that his trial counsel was ineffective by failing to impeach several eyewitnesses with each and every prior inconsistent statement. Id. at 104. Trial counsel focused on those inconsistencies that most advanced the theory of misidentification and ignored others that could be considered cumulative or unhelpful. Id. Finally, the SJC held that trial counsel was not ineffective for failing to impeach one prosecution witness on prior and pending criminal charges, noting that the minor charges likely would not have undermined her credibility and that cross-examination on this issue might have engendered sympathy towards her by the jury. Id. at 105-106.

CROSS-EXAMINATION – LIMITATION

Commonwealth v. Martin, 434 Mass. 1016 (2001) (rescript).

In this rescript opinion, the SJC reversed the decision of the Appeals Court, Commonwealth v. Martin, 50 Mass. App. Ct. 877, 880 (2001), and held that the trial judge abused his discretion in barring the defendant from cross-examining the alleged victim about her possible bias based on the fact that the defendant had sought and obtained two pending criminal complaints against her. Id. at 1016. Although a judge has broad discretion to determine the scope and extent of cross-examination, he may not bar all questioning about possible bias provided that there is some basis for showing bias. Id. at 1017.

DISCOVERY – ATTORNEY WORK PRODUCT

Adoption of Sherry, 435 Mass. 331 (2001) – Marshall, Greaney, Ireland, Spina, Cowin. See Evidence – Foster and Preadoptive Parents.

Child's counsel waived the protections of attorney work product when she permitted her expert to speak with the court investigator and with father's counsel. Id. at 336. Thus it was error for the trial judge to exclude the expert's opinion, which was contained in the court investigator's report. Id. However, the father was not prejudiced by the exclusion of the evidence. Id.

Child's counsel had retained a psychologist to evaluate her client's needs. Subsequently, counsel permitted the expert to speak with the court investigator, with father's first attorney, and then with father's second attorney. Counsel later advised the court that she would not be calling the psychologist as a witness. The judge, on work product grounds, struck the opinions and recommendations of the psychologist that were contained in the investigator's report and denied father's motion for leave to call the psychologist as a witness. The SJC held that child's counsel waived the work product privilege, either by voluntarily disclosing her expert's opinions, or by failing to take reasonable precautions to prevent an inadvertent disclosure. Id. at 336. It thus was error to exclude the information. Id.

DUE PROCESS – CROSS EXAMINATION RIGHT

Adoption of Don, 435 Mass. 158 (2001) -- Marshall, Greaney, Spina, Cowin, Sosman, Cordy. See Appellate Practice - Stay Of Decree Dispensing With Parental Consent; Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation;" Due Process - Delay Of Proceedings; Parental Unfitness – Sufficiency of Evidence.

See Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation."

DUE PROCESS - DELAY OF PROCEEDINGS

Adoption of Don, 435 Mass. 158 (2001) -- Marshall, Greaney, Spina, Cowin, Sosman, Cordy. See Appellate Practice - Stay Of Decree Dispensing With Parental Consent; Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation;" Parental Unfitness – Sufficiency of Evidence.

On appeal of judgments dispensing with consent to adoption of their children the parents argued that their due process rights were violated because of the lengthy delays in the proceedings. The trial took place over 45 non-consecutive days over a period of 20 months. Id. at 163-164. An extraordinary and prejudicial delay not caused by the parents could in some circumstances rise to the level of a due process violation. Id. at 170 (citing Care and Protection of Three Minors, 392 Mass. 704, 705 n.3 (1984)). However, the parents have not showed how they have been prejudiced by the delay. Id. It is the children who primarily suffered from the delay. Id.

EVIDENCE – EXPERT TESTIMONY, BEHAVIOR CHARACTERISTICS OF SEXUALLY ABUSED CHILDREN

Commonwealth v. Quincy Q., 434 Mass. 859 (2001) – Marshall, Greaney, Cowin, Cordy. Ireland, Spina, Sosman, dissenting in part.

See Evidence – Expert Testimony, Credibility of Witness.

EVIDENCE – EXPERT TESTIMONY, CREDIBILITY OF WITNESS

Commonwealth v. Quincy Q., 434 Mass. 859 (2001) – Marshall, Greaney, Cowin, Cordy. Ireland, Spina, Sosman, dissenting in part. See Evidence – Hearsay, Fresh Complaint.

At a trial on charges of rape and indecent assault and battery on a child, it was permissible for the prosecution's expert to testify that a physical examination of the child was completely normal and that the majority of girls examined for possible sexual abuse have no physical signs of abuse. Id. at 871-873. The defendant had argued that the expert impermissibly vouched for the child's credibility by linking general symptoms of sexually abused children with the experience of the particular child. Id. at 872. The SJC disagreed, noting that the expert did not comment on the child's credibility. The expert had simply given the jury information concerning the medical interpretation of an absence of physical evidence of sexual abuse, i.e., that it does not mean sexual abuse did not occur. Id. at 872-873.

EVIDENCE – EXPERT TESTIMONY, HEARSAY

Commonwealth v. McNickles, 434 Mass. 839 (2001) – Marshall, Greaney, Spina, Cowin, Sosman.

An expert may base her opinion on facts or data not in evidence provided that the facts or data are independently admissible. Id. at 855 (citing Dep't of Youth Servs. v. a Juvenile, 398 Mass. 516, 531, 532 (1986)). However, the expert may not testify on direct exam to the hearsay information on which

she relied. Id. at 857. Although the expert did so in this case, it was only because defense counsel erroneously insisted that the prosecution lay a foundation for the expert's testimony. Id. at 856. It was also clear that if the prosecution had not introduced the hearsay testimony, the defendant on cross-examination would have inquired on the subject, namely that the expert had relied on the reports of others in reaching her opinion. Id. at 856-857. Under these circumstances, there was no prejudicial error. Id. at 857.

EVIDENCE – FOSTER AND PREADOPTIVE PARENTS

Adoption of Sherry, 435 Mass. 331 (2001) – Marshall, Greaney, Ireland, Spina, Cowin. See Discovery – Attorney Work Product.

Under G.L. c.119, §29D, foster and preadoptive parents have a statutory right to be heard at termination of parental rights proceedings even if none of the parties choose to call them. Id. at 337. However, the admission of their testimony is subject to all the applicable rules of evidence, including relevance, personal knowledge, oath or affirmation, and right of cross-examination. Id. at 338. It was error for the judge to accept an unsworn, written statement by the foster mother. Id. However, the foster mother did testify under oath and was subject to cross-examination. Id. Under the circumstances, the father was not prejudiced by the court's acceptance of the written statement. The SJC left it to the trial court to determine the manner in which a foster parent's testimony should be taken in those situations where no party calls the foster parent as a witness. Id. at 338 n.6.

EVIDENCE – HEARSAY, DECLARATION AGAINST PENAL INTEREST

Commonwealth v. Tague, 434 Mass. 510 (2001) – Marshall, Spina, Cowin, Sosman, Cordy.

In order to admit a declaration against interest as an exception to the hearsay rule, the declarant must be unavailable to testify, and the statement must so far tend to subject the declarant to criminal liability that a reasonable person would not have made the statement unless it were true. Id. at 516. A person's failure to respond to the statement of another may be admitted as an "adoptive admission" only if the proponent of the evidence can also show that: (1) the person heard and understood the statement; (2) the person had an opportunity to respond to the statement; and (3) the circumstances were such that the person would have been expected to deny the accusation. Id. The judge erred in excluding the adoptive admission made by the prosecution's witness, but the error was harmless in light of the overwhelming evidence against the defendant. Id. at 517.

EVIDENCE – HEARSAY, FRESH COMPLAINT

Commonwealth v. Quincy Q., 434 Mass. 859 (2001) – Marshall, Greaney, Cowin, Cordy. Ireland, Spina, Sosman, dissenting in part. See Evidence – Expert Testimony, Credibility of Witness.

At a trial on charges of rape and indecent assault and battery on a child, it was error to admit a videotape of the child answering questions about the incidents as fresh complaint. Id. at 861. Under the doctrine of fresh complaint, an out-of-court statement by the complainant made after the alleged sexual assault is admissible to corroborate the complainant's testimony, but is not admissible for the truth. Id. at 867. While the complainant may testify to the fact that a fresh complaint was made, only the person to whom the complainant spoke with may testify regarding the details. Id. at 867-868. By admitting the videotape, the child testified to the details of her complaint, essentially corroborating herself. Id. at 868. This was improper. Id. at 869-870.

However, the SJC rejected defendant's argument that the videotaped complaint was not "fresh" because it took place approximately 10 weeks after the alleged offense. Id. at 870 n.15. Given the child's young age (five), that the defendant told her not to tell anyone, and the fact that the defendant as her babysitter had a supervisory role over her, the delay was not unduly long. Id.

The SJC also ruled that fresh complaint testimony by the father was impermissible because the father commented directly on the child's credibility and because he testified regarding his own interpretation of her words and emotions. Id. at 874-875.

EVIDENCE – HEARSAY, PRIOR RECORDED TESTIMONY

Commonwealth v. Johnson, 435 Mass. 113 (2001) – Marshall, Spina, Cowin, Sosman, Cordy. See Counsel – Ineffective Assistance.

At defendant's trial on charges of first-degree murder, the testimony of a witness on voir dire who later invoked the privilege against self-incrimination and refused to testify was properly admitted. Id. at 135. The voir dire testimony addressed the substantially same issues for which the prosecution admitted the testimony at trial, and defense counsel had a reasonable opportunity and a similar motivation to cross-examine during the voir dire. Id.

EVIDENCE – HEARSAY, SPONTANEOUS UTTERANCE

Commonwealth v. Marshall, 434 Mass. 358 (2001) – Marshall, Greaney, Ireland, Spina, Cowin.

The trial judge properly admitted the victim's statement to her friend made two weeks prior to her death that the defendant had assaulted and threatened her. Id. at 365. Although the statement was made approximately two hours after the alleged assault, "precise contemporaneousness is not required." Id. at 364 (citations omitted). The statement was made while the victim was in "a highly agitated state, precipitated by a recent traumatic event, before the victim had time to contrive or fabricate the remark." Id. at 365 (citations omitted).

EVIDENCE – IMPEACHMENT, BIAS

Commonwealth v. Martin, 434 Mass. 1016 (2001) (rescript).

See Cross-Examination – Limitation.

PARENTAL UNFITNESS - SUFFICIENCY OF EVIDENCE

Adoption of Don, 435 Mass. 158 (2001) -- Marshall, Greaney, Spina, Cowin, Sosman, Cordy. See Appellate Practice - Stay Of Decree Dispensing With Parental Consent; Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation;" Due Process - Delay Of Proceedings.

On appeal of judgments dispensing with the parents' consent to adoption of their five children, the parents argued *inter alia*, that the trial judge relied on stale evidence, when more current evidence

demonstrated their fitness. The SJC disagreed. Although stale information cannot form the basis for a finding of current unfitness, prior history has prognostic value. Id. at 166. In this case, prior history included father's substance abuse and domestic violence and mother's inability to care for the children, resulting in several voluntary placements with DSS. Id. at 160-163. More current findings, which were unchallenged on appeal, included that mother had not followed through with attendance at support groups or seeking employment, did not acknowledge the harm to the children as a result of the father's substance abuse and the lengthy voluntary placements with DSS, and that she had failed to demonstrate emotional or financial independence. Id. at 165-166. "Many of the parents' arguments amount to no more than a disagreement with the judge's weighing of the evidence and credibility determinations regarding witnesses." Id. at 166. The judge was not required to believe the mother's testimony or that of any other witnesses. Id. at 167.

Adoption of Hank, 52 Mass. App. Ct. 689 (2001) -- Rapoza, Kantrowitz, McHugh. See Adoption – Dispensing with Parental Consent, Findings of Fact.

The Appeals Court affirmed the finding of the Probate Court that father was currently unfit. The Court noted that the children had been abused and neglected while in the care of their parents, that father had a long history of substance abuse, that father failed to participate in available services or to remedy his substance abuse problem, that he cancelled several visits with the children and failed to appear a trial. Id. at 690-691. At least seven of the factors listed in G.L. c.210, §3 were present. Id. at 691.

Adoption of Dora, 52 Mass. App. Ct. 472 (2001) -- Porada, Kantrowitz, Cohen. See Adoption - Dispensing With Parental Consent, Adoption Plan.

The Appeals Court affirmed the trial judge's finding that the parents were unfit to care for their child. Id. at 478-479. The parents had significant intellectual deficits and were unable to carry out normal caretaking responsibilities. Id. They failed to provide for her basic needs, to take normal safety precautions, and to follow through with medical advice. Id. Although provided with in-home, "hands-on" services designed to teach them how to meet the child's basic needs, the parents did not improve their parenting skills sufficiently. Id. at 478-479. In addition, the child was thriving in her foster home and deteriorated when returned to her parents on a trial basis. Id. at 479. "The trial judge was entitled to take into account the child's condition and over-all adjustment while in placement with her foster parents as compared with those periods when she was under the care of her biological parents." Id. at 479.

PERMANENCY HEARINGS

Adoption of Donald, 52 Mass. App. Ct. 901 (2001) (rescript).

See Adoption - Dispensing With Parental Consent, Effect Of Decree.

TRIAL – REOPENING OF EVIDENCE

Commonwealth v. Moore, 52 Mass. App. Ct. 120 (2001) – Armstrong, Smith, Brown.

A judge did not err in denying defendant’s request to testify, made only after the close of the evidence. Id. at 122-127. The defendant was advised by the judge of his right to testify and not to testify. After both the Commonwealth and the defendant had rested, the judge adjourned the trial to the next morning for closing arguments. The following morning, the defendant asked to testify and the judge refused. Although the defendant has a constitutional right to testify, that right is not absolute, and may bend to

other legitimate interests. Id. at 126. There is a strong interest in "a stable, predictable trial format with a definite end as well as a beginning." Id. (citations omitted). A judge has discretion to admit evidence after the party has rested. Id. A judge errs in refusing to reopen the case and admit the proffered evidence only if the excluded evidence was so important to a just result in the case that it overrides the presumption in favor of maintaining usual trial procedures. Id. The defendant, in raising this issue in a motion for new trial, did not state what his testimony would have been had he been allowed to testify and, therefore the Appeals Court could not judge the importance of the missing testimony. Id. The Court further advised that a trial judge's decision whether to reopen a case cannot be made arbitrarily and that in the future judges should put their reasons on the record for allowing or denying a request. Id. at 126-127.

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